(EMB-7337)
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
TRENTON DIVISION

INTERACTIVE MEDIA ENTERTAINMENT AND GAMING ASSOCIATION, L.L.C., a limited liability corporation of the State of New Jersey,	:	CIVIL ACTION
	:	Case Number 07-2625 (MLC)
Plaintiff,	:	
-vs-	:	
ALBERTO GONZALES, Attorney General of the United States, THE FEDERAL TRADE COMMISSION and THE FEDERAL RESERVE SYSTEM,	:	
Defendants.	:	

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS COMPLAINT AND REPLY TO DEFENDANT'S RESPONSE TO MOTION FOR ISSUANCE OF TEMPORARY RESTRAINING ORDER

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On the Brief

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LEGAL ARGUMENT

Point One

Defendants' Motion to Dismiss the Complaint, Based on an Alleged Lack of Standing, Should Be Denied Because Plaintiff Has Associational Standing Due to the Threat of Criminal Prosecutions and Loss of Revenue Under the UIGEA.

A. The Standard of Review.

A motion to dismiss does not attack the merits of the case, but merely tests the legal sufficiency of the complaint. *Sturm v. Clark*, 835 *F.2d* 1009, 1011 (3d Cir. 1987). For purposes of ruling on a motion to dismiss for want of standing, or any other matter, the court must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. *Warth v. Seldin*, 422 *U.S.* 490, 501 (1975); *Jenkins v. McKeithen*, 395 *U.S.* 411, 421-422 (1969). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice. On a motion to dismiss, the court "presumes that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 *U.S.* 555, 561 (1992). The court may not dismiss a complaint unless it appears beyond all possible doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Borawski v. Henderson*, 265 *F.Supp.2d* 475, 481 (D.N.J. 2003).

B. Plaintiff Demonstrates the Requisite Standing to Maintain this Action.

Defendants claim that Plaintiff, Interactive Media Entertainment & Gaming Association, L.L.C. (hereinafter referred to as "iMEGA"), has no standing to challenge the statutory scheme of the Unlawful Internet Gambling Enforcement Act (hereinafter referred to as the "UIGEA"). Plaintiff submits that it has "alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin, supra,* at 498-499 (1975). To meet the standing requirement, a plaintiff must demonstrate that it: (1) has suffered an injury-in-fact, which is the invasion of a legally protected interest that is concrete and particularized, and actual and imminent, not conjectural or hypothetical; (2) that the injury is causally connected and traceable to an action of the defendant; and, (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife, supra*, at 560-561 (1992); *Warth v. Seldin, supra*, at 508 (1975); *Sierra Club v. Morton*, 405 *U.S.* 727, 740-741 (1972); *The Pitt News v. Fisher*, 215 *F.3d* 354, 359 (3d Cir. 2000). A plaintiff satisfies the injury-in-fact prong of the requirement where he or she alleges an injury that affects him or her in a personal and individual way. *Citizens for Health v. Leavitt*, 428 *F.3d* 167, 176 (3d Cir. 2005). An injury is redressable for standing purposes where plaintiff can show that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 *U.S.* 167, 181 (2000).

As iMEGA demonstrated in its Brief in support of its application for issuance of a Temporary Restraining Order, it has standing as an Association in this case to challenge the statute in question. A group that engages in some form of public or private expression above a *de minimus* threshold is an "expressive association" for standing purposes. The group need not be an advocacy group or exist primarily for the purpose of expression. *Boy Scouts of America v. Dale*, 530 *U.S.* 640, 648, 120 *S.Ct.* 2446, (2000); *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 *F.3d* 435, 443 (3d Cir.2000). Plaintiff submits that it is essential to recall the terms of the UIGEA, in particular its impact on the First Amendment, the commercial livelihood of iMEGA's members, and the UIGEA's criminal penalty provisions. To satisfy the standing requirement, the association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. As long as this can be established, and as long as the nature of the claim and the relief sought does not make the individual participation of each injured party indispensable to a proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction. *Warth v. Seldin, supra*, 422 *U.S.* at 511 (1975).

In addition to all of the arguments previously presented, amongst the category of the industry participants which are part of Plaintiff iMEGA are a category established as "affiliates" or more accurately "affiliate marketers". Many of these entities,/people are based out of and/or operate within the borders of the United States. These "affiliates"/"affiliate marketers" operate and/or maintain and/or own websites and/or "portals", which allow visitors/customers with access to a variety of informational content involving gaming/gambling. From those "portals", by use of "hyperlinks" and/or other similar technologies/means, visitors/customers through a series of "mouse clicks" be directed to and/or from Internet gaming/gambling websites.

Pursuant to the provisions of 31 *U.S.C.* § 5362(1)(D) (which is part of UIGEA), the activities of "affiliates"/"affiliate members" in providing "information and instructions as to the establishment or usage of funds", in connection with Internet gaming/gambling, either overtly or through the use of "hyperlinks" – conduct which was lawful before the passage of UIGEA – can now be construed by the Act (and the Government) as constituting a "bet or wager". Because it is constituted as a "bet or wager", under 31 *U.S.C.* §5362(10), such actions can be punishable under the UIGEA as the Federal crime of "unlawful internet gambling." Furthermore, 31 *U.S.C.* § 5366 also provides for separate and distinct criminal sanctions for the conducting of or the acceptance of financial transactions for unlawful internet gaming/gambling, thus creating and defining an additional and a wholly new set of predicate criminal acts.

Therefore, in addition to all of the other legitimate standing claims of Plaintiff, the impact of UIGEA upon "affiliates"/"affiliate marketers" in rendering their activities illegal when the actions prior to such enactment were either absolutely legal, or at the very least, rationally legally, have now become subject under UIGEA to claims of distinct criminal acts under several provisions of the Act. Thus, Plaintiff continues to show it has standing in support of its Complaint and request for Temporary Restraints.

C. The UIGEA Directly Causes Injury-in-Fact To Plaintiff's Members and the Public.

The crux of the Defendants' argument with respect to standing is that iMEGA members have not suffered any injury sufficient to confer standing. The government makes several arguments in this regard: (1) iMEGA cannot base standing on the chilling of its members First Amendment Rights; (2) iMEGA has not alleged a credible threat of prosecution under the UIGEA sufficient to confer standing; and, (3) iMEGA's claim of its members' imminent financial ruin is insufficient to confer standing. Despite the Defendants' disclaimer, the sole purpose of the UIGEA is to end Internet Gambling, whether through prosecutions, or prevention of the use of payment instrument systems to pass along income to their businesses. The UIGEA was passed to criminalize Internet Gambling and its financing, and allow for the seizure of assets related to such. iMEGA's membership includes owners of Internet gambling businesses, and, as stated above, "affiliates" who are also in at least the line of commerce related to Internet gaming/gambling. The very enactment of the UIGEA presupposes the elimination of this industry and its direct/indirect supporters. The Defendants' claim that iMEGA's "subjective fears of prosecution" and lack of proof of financial destruction is insufficient to confer standing is neither logical, practical nor accurate.

The UIGEA imposes criminal liability on any person or entity violating 31 *U.S.C.* § 5363, including a term of imprisonment of up to five (5) years. Under the UIGEA, 31 *U.S.C.* § 5362(10)(A), unlawful Internet gambling means to "place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet is initiated, received or otherwise made." (Emphasis provided). The thrust of the statutory scheme is the elimination of Internet Gambling in part by criminalizing the otherwise neutral transmission of funds for such entertainment. In addition to the criminalization of other neutral transmissions of funds, the UIGEA also criminalizes sending and/or receiving such funds, thus directly threatening criminal prosecution of iMEGA's members who provide Internet Gambling/Casino entertainment as well as the average citizen of the United States, sitting home and playing Internet poker on her wireless laptop!

In a pre-enforcement challenge to a statute carrying criminal penalties, standing exists when "the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 *U.S.* 383, 392-393 (1988); *Babbitt v. United Farm Workers Nat. Union,* 442 *U.S.* 289, 298 (1979). In addition to the legislative debate on July 13, 2006 on HR 4411, which has already been cited in Plaintiff's initial brief, Plaintiff has shown the court that there are pending prosecutions under the provisions of the Wire Act, 18 *U.S.C.* § 1084, and other provisions of federal law in the Eastern District of Missouri under Indictment No. 4:06-CR-337-CEJ (MLM) in the matter of *United States v. Carruthers, et al.* The United States also recently indicted two (2) individuals in the Southern District of New York for money laundering who are executives of Neteller, P.L.C., a legally operating company organized and publicly traded in the United Kingdom. They were charged with conspiring to transfer funds with the intent to promote Internet gambling. Further, the United States recently subpoenaed financial institutions such as HSBC, Credit Suisse and Deutshe Bank, which underwrote initial public offerings of offshore Internet Gambling/Casinos. That article also reported the cessation of acceptance of Internet bets from the United States by BetonSports.com, a sports wagering company, "crippling its business." **Certification of Edward Leyden dated July 6, 2007.**

Since that time, however, the United States has continued its efforts under coordinate laws to stamp out Internet Gambling. As reported in Reuters, a British Internet Gambling company named PartyGaming reported a pre-tax loss of US $47.1m (£23.5m), due to the closure of its U.S. operations following the passing of the Unlawful Internet Gambling Enforcement Act (UIGEA). Total revenue for the group was down 68% to US$212.5m, compared with US$661.9m in the same period last year. **Certification of Edward Leyden dated September 10, 2007.** During hearings regarding the enforcement of the UIGEA on April 19, 2007, former Attorney General Defendant Alberto Gonzales promised Republican Arizona Senator Jon Kyl that he would do everything in his power to ensure the billion-dollar industry has been quashed. **Certification of Edward Leyden dated September 10, 2007;** *see also* Hartman, Robert, Staff Editor, *Alberto Gonzales Lies in Hearing About Internet Gambling*, www.CasinoGamblingWeb.com for July 24, 2007, and Lawrence G. Walters, Weston, Garrou, DeWitt & Walters, www.GameAttorneys.com April 20, 2007.

When a party brings a pre-enforcement challenge to a statute that provides for criminal penalties and alleges that the statute violates First Amendment rights, the courts have held that two (2) potential injuries are present. First, there is injury arising from the threat of enforcement. It is not necessary that a person expose himself to arrest or prosecution under a statute in order to challenge that statute in federal court. *Babbitt v. United Farm Workers Nat'l Union, supra,* at 298; *Steffel v. Thompson*, 415 *U.S.* 452, 459 (1974); *Epperson v. Arkansas*, 393 *U.S.* 97 (1968). The rationale is that a credible threat of present or future prosecution itself constitutes an injury that is sufficient to confer standing, even if there is no history of past enforcement. *Doe v. Bolton*, 410 *U.S.* 179, 188 (1973). Second, there is injury when Plaintiff is deterred from exercising his right to free expression or forgoes expression in order to avoid enforcement consequences. *Meese v. Keene*, 481 *U.S.* 465 (1987). In these circumstances, the inherent problem with the statute is an innate steering by the proponent of the act toward self-censorship. *Virginia v. American Booksellers Ass'n, Inc.*, Supra 484 *U.S.* at, 393. Further, as pointed out in Plaintiff's initial Brief in support of issuance of a Temporary Restraining Order, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 *U.S.* 347 (1976). These two (2) injuries are interrelated in that both hinge on the existence of a credible threat that the challenged law will be enforced. If such a threat exists, the party is faced with the dilemma of either engaging in the expressive activity, thus inviting prosecution, or succumbing to the threat and thereby forgoing free expression. As such, as long as a credible threat of prosecution exists, a party has standing to bring a pre-enforcement challenge to the statute. *New Hampshire Right to Life P.A.C. v. Gardner*, 99 *F.3d* 8, 14 (1st Cir. 1996).

Whether a "credible threat" of prosecution exists is not a difficult standard to meet. Here, there is a direct threat and a direct causal connection. For example, in *Babbitt, supra,* although defendants argued that no criminal penalties had ever been imposed under the statute and that none might ever be imposed, the United States Supreme Court held that there was still a credible threat of prosecution. The Court found that since the defendants had not disavowed any intention of invoking the criminal penalty provision against the violators, the Plaintiff were "not without some reason in fearing prosecution for violation of the ban." *Id.* at 302. As noted, in this case the former Attorney General of the United States, a Defendant in this case, addressing the co-sponsor of this bill, Senator Kyl, stated he would do everything in his power to enforce the UIGEA. *See also Doe v. Bolton,* 410 *U.S.* 179 (1973), where the United States Supreme Court held that Plaintiffs had standing even though no one had been prosecuted or threatened with prosecution under the statute; and *Virginia v. American Booksellers Ass'n, Inc.*, Supra (1988), holding that a statute was "aimed directly" at entities like Plaintiffs in that matter, and, since the state had not suggested that the newly enacted law would not be enforced, the Plaintiffs had an actual and well-founded fear that the law would be enforced against them.

In *Pic-A-State Pa, Inc. v. Reno*, 76 *F.3d* 1294 (3d Cir. 1996), plaintiff brought suit claiming the Interstate Wagering Amendment was unconstitutional. The government argued that plaintiff had no standing because it had never been threatened with prosecution. The Third Circuit held that:

> "Although Pic-A-State has not been prosecuted under the Interstate Wagering Amendment, the impact of the Amendment is sufficiently direct and immediate to create an adversity of interest between Pic-A-State and the Government. Not only has Pic-A-State terminated its business and suffered economic loss in response to the passage of this Amendment, but any further attempt to pursue its line of business would risk serious criminal penalties." (Emphasis provided).

Id. at 1298. The court also noted that strong policy reasons dictated against requiring plaintiff to engage in illegal conduct before its challenge could be heard. The court stated that:

> "Fear that courts may find the statute valid will deter many from risking violation; defense of criminal proceedings on constitutional grounds simply is not an adequate remedy. In addition to this practical fact, more abstract principles suggest that a citizen should not be required to sacrifice his wish to conform to valid social prescriptions in order to test his belief of invalidity; citizens should be allowed to prefer official adjudication to private disobedience." (Emphasis provided).

Id. at 1299, n.4 (citations omitted).

It is axiomatic that financial or economic injury is the most common type of injury upon which standing is based and is a legally protected interest. *Sierra Club v. Morton*, 405 *U.S.* 727, 734-735 (1972). The United States Supreme Court has recognized on several occasions standing in cases where "criminal statutes [were] challenged by persons who claimed that the effects of the statute were to deter others from maintaining profitable or advantageous relations with the complainants." In such cases, business operations were ceased because of a realistic fear of prosecution. *See, i.e., Pierce v. Society of Sisters*, 268 *U.S.* 510 (1925); *Truax v. Raich*, 239 *U.S.*

33 (1915). As with other types of injury, any economic injury must be concrete and particularized and actual and imminent, not conjectural or hypothetical. *Sierra Club*, 405 *U.S.* at 735.

In the instant matter, there can be little doubt that the UIGEA is inflicting some concrete injury on the trade association and its members. Some members have been forced to discontinue operation of the businesses in order to avoid potential prosecution. This has very obviously resulted in economic injury as they are no longer pursuing their businesses for fear of prosecution. Even with prosecution or injunction aside for the moment, iMEGA's members have lost significant revenues since the UIGEA was passed. iMEGA's members have been advised that banks, clearing houses, financial services issuing payment system instruments, as well as credit card companies, have discontinued the acceptance of funds for transfer by persons wishing to bet or wager with iMEGA members' Internet Casinos because of the imminent threat of criminal prosecution, forfeiture and other penalties under the Act. Furthermore, as indicated in both the Leyden Certification of September 10, 2007 (paragraphs 5-8) and earlier arguments of Plaintiff there are those "affiliates"/"affiliate marketers" who will also be subject to the threats listed above and throughout both briefs.

On the following page appears a sample stock quotation taken on September 5, 2007 from Reuters [http://www.reuters.com] on the Internet for PartyGaming, Ltd., a British Internet Gambling company. The value clearly tumbled from a high of approximately $2.25 per share on the eve of adoption of the UIGEA to a present low of $0.59 per share. Clearly, the value of its shares is directly related to the proscription of use of payment system instruments which would allow it to function. Most likely this real world demonstration of direct economic loss could continue across the Internet Gambling industry as well as related industries, including payment instrument systems which generate income on each transaction.

Further, Defendants are incorrect in asserting a lack of standing from Plaintiff's status as an Association. An Association has standing to assert the claims of its members when: (1) its

Price Quotation, September 5, 2007

Reuters [http://www.reuters.com] PartyGaming, Ltd.

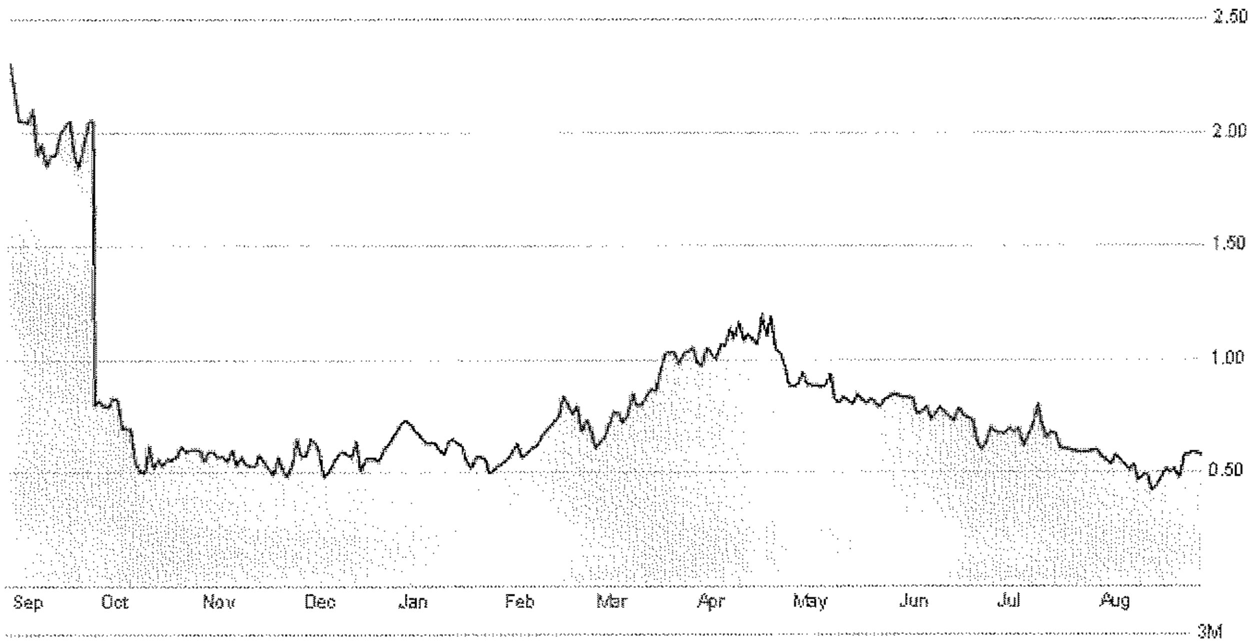
Partygaming Plc PYGMF.PK (OTC)

Sector: **Industry:** View **PYGMF.PK** on other exchanges
As of 11:00 PM EST

$.57 USD
Price Change
0.00
Percent Change
0.00%

›Independent Research ›Broker Research

Today 5 Day 10 Day 1 Month 6 Month 1 Year 3 Year 5 Year | 1 Year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members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to their association's purpose; and, (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit. An Association has constitutional standing when it seeks judicial relief in its own right to redress an injury to the organization itself. Under the leading case of *Hunt v. Washington State Apple Adver. Comm'n,* 432 *U.S.* 333, 343 (1977), iMEGA has Associational, constitutional standing since its own conduct in advocacy of Internet Gambling is threatened by UIGEA's prohibitions, and its members and those with the same interests are threatened with criminal prosecution under UIGEA for promoting and soliciting Internet Gambling, as well as accepting bets for the same. There are no damages claims asserted in this specific request for relief, only requests for temporary and permanent injunctions. A request for declaratory and injunctive relief does not require individualized proofs and therefore, is properly resolved in a group context on the issue of "associational standing" to sue.

As has been asserted in Plaintiff's initial Brief in support of Motion for issuance of a Temporary Restraining Order, an Association may assert the rights of its members so long as the challenged action adversely affects its members' Associational ties. The Association must allege that its members, or any one of them, are suffering immediate or threatened injury, including seizure of property or criminal prosecution under the challenged statute as a result of the challenged statute, to make out a justiciable case as if the members themselves brought suit. *American Civil Liberties Union v. Gonzales*, 2006 WL 2927284 (E.D. Pa. 2006). Clearly, as argued above, iMEGA's members face real, physical threat of criminal prosecution, seizures, forfeiture and civil suits under UIGEA. In their own right they would face these challenges; as an Association, and seeking only declaratory judgment as to the validity of the UIGEA, iMEGA possesses the requisite interest in this matter to represent its members and the public interest.

Finally, a declaratory judgment action here will present a justiciable controversy rather than "abstract, hypothetical or contingent questions." *Alabama State Federation of Labor v. McAdory*, 325 *U.S.* 450, 461 (1945). A request for declaratory and injunctive relief does not require individualized proofs and, therefore, is properly resolved in a group context on the issue of "associational standing" to sue. *Hunt v. Washington Apple Advertising Commission, supra,* at 342. *See also*, *Warth*, 422 *U.S.* at 515, holding that if the association seeks a declaration, injunction or some other form of prospective relief, it can be reasonably supposed that the remedy, if granted, will inure to the benefit of the members of the association.

POINT TWO

Defendants Err in Asserting That the Mere Chilling of Unspecified First Amendment Free Speech Rights is the Sole Ground for Relief and Ignore the Fundamental Invasion of Privacy Rights Raised by the Plaintiff.

Here, the Defendants have not advanced any opposition to Plaintiff's challenge to the constitutionality of the UIGEA, and have not opposed Plaintiff's showing that there are less restrictive, fully effective means to control the "mischief" that UIGEA was intended to control. Their argument is that UIGEA may cause some "mere" chilling of First Amendment rights. But contrary to the Defendants' assertion, iMEGA is not claiming that the harm here is simply the chilling of some vague protected speech rights. As the United States Supreme Court has stated, "[i]n recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 *U.S.* 1, 11 (1972); *see also Baird v. State Bar of Arizona*, 401 *U.S.* 1 (1971); *Keyshian v. Board of Regents*, 385 *U.S.* 589 (1967); *Lamont v. Postmaster General*, 381 *U.S.* 301 (1967). The Defendants bear the burden of proof on the ultimate question of constitutionality and Plaintiffs must be deemed likely to prevail unless the Government has shown that demonstrated less restrictive alternatives are less effective than the statute being challenged. *Ashcroft v. American Civil Liberties Union*, 542 *U.S.* 656, 665, 124 *S.Ct.* 2783, 2792 (2004). The clear import of the law is that there can be no mere chilling of a First Amendment Constitutional right.

In *Brooklyn Legal Services Corp. v. Legal Services Corp.*, 462 *F.3d* 219, 226 (2nd Cir. 2006), the court specifically held that:

> "LSC, through its operation of the regulation, acted upon the plaintiffs by depriving them of the ability to form unrestricted affiliates and thereby to express their putative free speech rights without risking enforcement action by LSC. The rejection put plaintiffs to the choice of either forgoing the exercise of certain constitutional rights they believed they were entitled to, or risking the loss of LSC funding by doing what LSC expressly directed them not to do. That is hardly a hypothetical injury."

Id. at 227. The same reasoning applies here. The UIGEA has deprived iMEGA members and their affiliates of their ability to exercise their free speech and associational rights by criminalizing their promotion of Interactive Internet activities. It has criminalized the use of neutral payment system instruments, as well as the sending or receipt of funds for Internet Gambling over the Internet. Further, one cannot promote use of the Internet for Internet Gambling without risking prosecution. Thus, iMEGA members, and those whose interests are protected and promoted by iMEGA, are not only forced to either forego the exercise of their constitutional free speech and association rights or risk prosecution; they face significant criminal and civil penalties and the industry is undergoing significant economic losses from the enactment of UIGEA.

As has already been demonstrated in Plaintiff's initial Brief, the courts have addressed the advances in communication and knowledge sharing brought on by the advent of the Internet and made a part of almost everyone's life. Coupled with a recognition of basic, fundamental privacy rights beginning with *Roe v. Wade*, 410 *U.S.* 113, 93 *S.Ct.* 705 (1973), and continuing through *Lawrence v. Texas,* 539 *U.S.* 558, 123 *S.Ct.* 2472 (2003), the United States Supreme Court has now held, on multiple occasions, that Internet access to activity which is consensual and has a selfregulated gateway, inherently through payment requirements and through filtering, is private conduct subject to strict scrutiny due to its protection under the First Amendment. As already argued in Plaintiff's initial Brief, in *Ashcroft v. American Civil Liberties Union*, 542 *U.S.* 656, 124 *S.Ct.* 2783 (2004), the Court sustained issuance of a preliminary injunction against enforcement of the criminal penalties of the Child Online Protection Act because its prohibitions did not constitute the least restrictive means to prevent child pornography in light of the availability of filtering programs which exist and can be used to prevent access. Further, and as has already been argued by the Plaintiff, the United States Supreme Court, while recognizing the compelling state interest in protecting children from unsolicited sexual literature, has struck down regulations which controlled Internet-based access to sexual literature where the access was consensual and the service had to be accessed by a listener willing to pay for the service. *Sable Communications of California, Inc., v. FCC*, 492 *U.S.* 115 (1989).

The most inherently invidious danger of the UIGEA is the criminalization of the mere passage of credit along established credit avenues. As has already been argued by the Plaintiff, the mere use of payment system instruments is criminalized under UIGEA if the end result is to be its use in Internet Gambling, whether or not it is a legal activity where originated, processed, transmitted, credited, received, deposited and/or spent. While purporting to decriminalize such uses if the activity is legal, there is no way for our presupposed Internet bettor, sitting at home at her laptop, to determine whether her wagering is legal and if she is breaking the law, since the identification of a "legal" or "illegal" transaction is that "such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received or otherwise made." 31 *U.S.C.* § 5362(10)(A). However, under 31 *U.S.C.* § 5364(a), the implementation of required systems to identify and block, prevent or otherwise prohibit transactions which are restricted by the UIGEA is delegated to administrative regulations and computer programs which have not been enacted.

The defective statutory scheme in the UIGEA does not account for the variation in state laws, as pointed out in Plaintiff's initial Brief, between states which legalize gambling, permit fund transfers for legal "brick and mortar" gambling, or, more significantly, restrict gambling, but provide for an exception for the player with only personal winnings at stake. At least one (1) court to date, in a prosecution for illegal bookmaking on the Internet under the Wire Act, has determined that:

> It is irrelevant that Internet Gambling is legal in Antigua. The act of entering the bet and transmitting the information from New York via the Internet is adequate to constitute gambling activity within New York State. New York Penal Law § 225.00(4) further provides that "[a] person 'advances gambling activity' when, acting other than as a player, he engages in conduct which materially aids any form of gambling activity," which the defendants here did. *U.S. v. Gotti,* 459 F.3d 296, 340-341 (2nd Cir. 2006)(Emphasis provided).

As the emphasized portion of the opinion shows, the Second Circuit recognizes this dichotomy. As already noted in this matter in Plaintiff's initial Brief, there are states, including the State of New Jersey, where gambling laws contain an exception for "players" or persons wagering only private winnings, regardless whether the activity is legal or illegal elsewhere. In fact, even Subsection (a) of the Wire Act itself, which has been the instrument of enforcement against Internet Gambling to date, exempts private "players" because it only criminalizes the conduct of those who are "engaged in the business of betting or wagering," but not isolated players. 18 *U.S.C.* § 1084(a). *See* Grunfeld, Michael, *Don't Bet on the United States Internet Gambling Laws: The Tension Between Internet Gambling Legislation and World Trade Organization Commitments,* 2007 *Colum. Bus. L. Rev.* 439, 446, 447 (2007).

An even more inherent danger in the UIGEA's regulation of otherwise legal use of payment system instruments is the criminalization of credit itself, where the end use is one that the government in power at the time deems wrong. Currently in legal, political and social circles, debate goes on concerning terrorism, terrorist acts and the funding of terrorist cells, which tumbles into the surveillance, data mining and tracking of personal communications and transactions. UIGEA opens the door to censorship of literature which may be deemed to support terrorism, espouse unpopular global politics or circulate warnings of secret government monitoring by criminalizing our presupposed home laptop user's ordering a "proscribed" book from an on-line bookseller with her bank's debit card. As already noted, the United States Supreme Court has already warned against this dangerous trend in a free, Internet Age society:

> Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid, . . . and that the Government bear the burden of showing their constitutionality, . . . This is true even when Congress twice has attempted to find a constitutional means to restrict, and punish, the speech in question. *Ashcroft v. American Civil Liberties Union*, 542 *U.S.* at 660, 124 *S.Ct.* at 2788. (citations omitted).

Thus, iMEGA asks this court to issue a preliminary injunction against enforcement or introduction of regulations under the UIGEA, and declare the law unconstitutional. Quite as equally as a speech restriction, UIGEA strikes at the core of privacy in the Internet Age by seeking to criminalize content and activity.

POINT THREE

The Case Is Ripe for Adjudication As iMEGA's Members Risk Loss of Revenue and Prosecution and the Defendants' Failure to Adopt the Regulations Required to Enforce UIGEA In a Timely Fashion is a Final Agency Action Subject to Review.

Defendants assert in their Brief in Support of their Motion to Dismiss Plaintiff's Complaint that this matter is not ripe for adjudication and should be dismissed. The argument is premised on the fact that the responsible government agencies, Defendant Alberto Gonzales as Attorney General of the United States, Defendant Federal Trade Commission and Defendant Federal Reserve Board, did not adopt the regulations called for by the UIGEA. However, it is this very failure to act which causes the their argument to fail in the first place. The UIGEA, 31 *U.S.C.* § 5364(a), mandates the Defendants Board and Commission, acting together with or apart from the Defendant Attorney General, to adopt regulations within two hundred and seventy (270) days of the effective date of the UIGEA, or no later than July 10, 2007. The regulations were supposed to regulate financial institutions such as banks, clearing houses and other financial institutions licensed by the Federal Reserve System, financial services issuing instruments known as payment system instruments, as well as financial companies which have issued credit cards. The regulations were supposed to implement systems to identify and block, prevent or otherwise prohibit transactions of persons wishing to engage in games of chance and/or skill and wagering on them with the said Internet Casino websites which are restricted by the UIGEA. As of this date, no regulations have been introduced by the Defendant Board, the Defendant Commission, or the Defendant Attorney General, no public comment has been solicited, and no regulations have been adopted by any of the Agencies required to do so.

The "ripeness" doctrine determines when a suit can be brought. *Presbytery of New Jersey of Orthodox Presbyterian Church v. Florio*, 40 *F.3d* 1454 (3rd Cir. 1994). Ripeness refers to whether the harm asserted has matured sufficiently to warrant judicial intervention. *Warth v. Seldin*, *supra,* at 510. The ripeness doctrine serves to determine whether a party has brought an action prematurely and counsels abstention until such time as a dispute is sufficiently concrete to satisfy the constitutional and prudential requirements of the doctrine.

Here, the case is clearly ripe for review and the Restraining Order must be granted because no regulations, which would define criminal conduct, or permit transactions which are legal, were adopted. Under the Federal Administrative Procedures Act, "agency action includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 *U.S.C.* § 551(13)(Emphasis provided). Simply put, the government missed the deadline to define legal and illegal transactions. This adds to the arguments against the constitutionality of the statutory scheme, which, as has already been shown, is riddled with exceptions permitting the very gambling which the policy underpinning the UIGEA purports to deplore and which the regulations might have helped to define and refine. The UIGEA exempts at least three (3) specific forms of gambling from its ambit completely: sports fantasy league gambling (which exemption has exceptions of its own); pari-mutuel horseracing; and, interstate lotteries. Furthermore, it exempts from regulation any form of gambling on Tribal lands (Intranet or Internet) which, for purposes of the Act and gambling practices, are considered sovereign states, whether such gambling is conducted on a specific Tribal land or between Tribal lands. 31 *U.S.C.* § 5362(1); 31 *U.S.C.* § 5362(1)(10). The regulations were supposed to require implementation of systems by payment instrument systems to intercept and block those transactions which are illegal, and thus permit those which are legal. 31 *U.S.C.* § 5364 requires that:

> In prescribing regulations under subsection (a), the Secretary and the Board of Governors of the Federal Reserve System shall--
>
> (1) identify types of policies and procedures, including nonexclusive examples, which would be deemed, as applicable, to be reasonably designed to identify and block or otherwise prevent or prohibit the acceptance of the products or services with respect to each type of restricted transaction;
>
> (2) to the extent practical, permit any participant in a payment system to choose among alternative means of identifying and blocking, or otherwise preventing or prohibiting the acceptance of the products or services of the payment system or participant in connection with, restricted transactions;
>
> (3) exempt certain restricted transactions or designated payment systems from any requirement imposed under such regulations, if the Secretary and the Board jointly find that it is not reasonably practical to identify and block, or otherwise prevent or prohibit the acceptance of, such transactions; and
>
> (4) ensure that transactions in connection with any activity excluded from the definition of unlawful internet gambling in subparagraph (B), (C), or (D)(i) of section 5362(10) are not blocked or otherwise prevented or prohibited by the prescribed regulations. (Emphasis provided).

The regulations in fact call for adoption of some form of "filtering" which, as has already been shown in Plaintiff's initial Brief in support of motion for issuance of a Restraining Order, is the least restrictive means recognized by the United States Supreme Court to regulate private conduct. As has already been conclusively shown in Plaintiff's initial Brief, filtering can be accomplished at the user interface, one's home computer, rendering the UIGEA unnecessary and unconstitutionally intrusive.

The Internet Gambling industry took pains to develop its own standards over five (5) years ago when similar legislation to the UIGEA was proposed. The Internet Industry Association, www.iia.net.aus, an Australian Trade Association, published its *Internet Industry-Interactive Gambling Industry Code: A Code for Industry Co-Regulation in the Area of Internet Gambling Content Pursuant to the Requirements of the Interactive Gambling Act of 2001* in December 2001. Even then, the proposed self-regulating code contained *Schedule 1-Scheduled Filters* § (5), which listed fifteen (15) readily available commercial filters.

More significant is the fact that the Government Accounting Office prepared a study for Congress during consideration of Internet Gambling regulation under the *Leach-LaFalce Internet Gambling Enforcement Act*, H.R. 556-2002 in 2002. That report advised Congress that the major credit card companies, payment aggregators and banks already had in place filtering or coding to regulate Internet Gambling related transactions. *Report to Congressional Requestors, Internet Gambling: An Overview of the Issues,* GAO-03-89 (December 2002), 20-27. The GAO also reported on the emergence of new technology and approaches to self-regulation. *Id.* at 33-34. Further, law enforcement sources reported little concern with issues of money laundering and fraud. *Id.* at 34-38.

Finally, when an agency fails to enact regulations pursuant to its statutory mandate, the action is a final agency determination. 5 *U.S.C.* § 551(13)(also known as the Administrative Procedures Act, or "APA") provides that "agency action includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." (Emphasis provided). Thus, contrary to the Defendants' contentions, the issue is not one of ripeness; the designated agencies' failure to enact regulations is a final action. The court, in *San Juan Citizens' Alliance v. Babbitt*, 228 *F.Supp.2d* 1224 (D. Colo. 2002), held that where the Federal Bureau of Land Management had failed to enact proper standards for maximum coal bed methane well density by not performing required testing, the failure to act was a final action subject to review and defeated the agency's motion to dismiss based upon a ripeness claim. *Id.* at 1231-1232. The court stated that: "The defendants' assertion that it hopes to fulfill, or even will fulfill, its . . . obligations in the future does not address its current failures to act and is misguided." *Id.* at 1232. The Tenth Circuit sustained the District Court's grant of a Temporary Restraining Order prohibiting implementation of a critical habitat designation where no mandated environmental assessment was performed, finding that the failure to perform the assessment within the statutorily required time line was a "final agency action" and that failing to adopt an assessment invalidated the designation, which threatened Plaintiff's flood control projects. *Catron County Bd. of Com'rs, New Mexico v. U.S. Fish & Wildlife Service*, 75 F.3d 1429, (10th Cir. 1996).

Most tellingly, in the review of regulations which affect First Amendment protected rights in a technological setting, regulations which were in fact adopted by the Federal Communications Commission were found to be in conflict with the statutory mandate and were invalidated. *Midwest Video Corp. v. F.C.C.*, 571 F.2d 1025 (8th Cir. 1978), *aff'd F. C. C. v. Midwest Video Corp.*, 440 U.S. 689, 99 S.Ct. 1435 (1979). The regulations set forth requirements for cable television operator content based on origination point, local access and content. The court was scathing at one point in addressing the Commission's action:

> The Commission, in its requirement that cable operators exercise prior restraint of obscenity in access cable casting, attempts to transfer to cable operators the very censorship power statutorily forbidden to the Commission in § 326 of the Act. The Commission's

> "belief" that cable operators would be free of legal liability because they were only following orders seems ill-founded when the orders are to do what it cannot do.
>
> The aplomb with which the Commission is willing to forcefully expose cable operators to criminal and civil suits, with all of the uncertainties and serious liberty and financial risks involved in defending them, particularly in these years of America's litigious binge, raises serious questions, about the rationality of the access rules, about the lack of evidence showing a public interest so strong as to warrant them, and about the due process interests affected; all of which would require the closest judicial scrutiny if the access rules of the Commission were to be otherwise held within its jurisdiction.

Id. at 1059. The cable operators were positioned precisely as are the payment instrument system providers in the Internet Gambling industry – they merely provided the means to facilitate transmission of programming. Plaintiff submits that the court's comments in *Midwest Video Corp., supra,* are highly appropriate and relevant to the matter at hand.

Since the adoption of the UIGEA, when the designated agencies should have been acting pursuant to Congress' directive to adopt regulations, not only has the Internet Gambling industry suffered as noted, but the Ninth Circuit, echoing the decision in *In Re MasterCard,* 313 *F.3d* 257 (Fifth Cir. 2002), has just ruled that the use of payment system instruments alone is not a basis for liability in a civil patent infringement case, even where it renders the activity more profitable. In *Perfect 10, Inc. v. Visa Intern. Service Ass'n,* ___ F.3d ___, 2007 WL 1892885, (9th Cir. July 3, 2007), the Plaintiff had sued a number of companies in separate litigations for patent violations. Among the various suits were an action against Amazon.com for use of its "Google" search engine, and the instant action against the provider of Visa credit card transactions. The Ninth Circuit Court of Appeals aptly noted the distinction between legal and illegal activities when payment system instruments are involved.

> The salient distinction is that Google's search engine itself assists in the distribution of infringing content to Internet users, while Defendants' payment systems do not. The *Amazon.com* court noted that "Google substantially assists websites to distribute their infringing copies to a worldwide market and assists a worldwide audience of users to access infringing materials. Defendants do not provide such a service. They in no way assist or enable Internet users to locate infringing material, and they do not distribute it. They do, as alleged, make infringement more profitable, and people are generally more inclined to engage

> in an activity when it is financially profitable. However, there is an additional step in the causal chain: Google may materially contribute to infringement by making it fast and easy for third parties to locate and distribute infringing material, whereas Defendants make it easier for infringement to be *profitable,* which tends to increase financial incentives to infringe, which in turn tends to increase infringement. 2007 WL 1892885 at 5 (internal quotations deleted).

The failure to enact regulations which define criminal and exempt, or non-criminal, payment system transactions is fatal to the UIGEA's enforcement precisely because the criminal conduct is to be defined, or excepted from liability, by the regulations. 31 *U.S.C.* § 5362(B)(4), *supra.* The United States Supreme Court has stated the general rule: "[W]here a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding." *United States v. Mendoza-Lopez,* 481 U.S. 828, 837-38, 107 S.Ct. 2148 (1987). As also previously noted in Plaintiff's initial Brief, but escaping attention when UIGEA was enacted, the Fifth Circuit has already ruled in *In Re MasterCard Litigation, supra,* that use of payment instruments to bet was not a violation of the Wire Act. "Because the Wire Act does not prohibit non-sports internet gambling, any debts incurred in connection with such gambling are not illegal." *Id.* at 263.

A review of the UIGEA shows specifically that the Wire Act was not amended along with enactment of the UIGEA, after the decision in *In Re MasterCard Litigation.* An interesting matter in the Newark District of the District Court for New Jersey involved an invocation of New Jersey statutes called *qui tam* laws, first enacted in 1797, which authorize an action in Superior Court by a betting loser to collect losses from a gambling winner. *Humphrey v. Viacom, Inc.,* 2007 WL 1797648 (D.N.J. 2007). Plaintiff sought to collect back his entry fees from an Internet Fantasy Sports league. The court held that such activity was not "gambling" for the purpose of the *qui tam* statute, while leaving the New Jersey statute legalizing the recovery of gambling debt intact even after referring to the UIGEA, which was enacted while the matter was pending.

For all these reasons, the lack of mandated administrative action to define the legal and illegal, criminal or civil, specific conduct under the UIGEA renders the matter ripe as a final administrative action. Further, the nebulous world created by the exceptions to the Act, the uneven treatment accorded Internet Gambling, and the significant curtailment of First Amendment rights, both actual and precursory, leads Plaintiff to respectfully submit that a Preliminary Injunction by way of Temporary Restraining Order is both necessary and appropriate in this matter. However, if the Government is willing to discuss now the UIGEA's unenforceability and allow this Honorable Court to enter a Temporary Restraining Order now, Plaintiff and the Defendants might be able to craft an appropriate Order without delay or harm to any party.

POINT FOUR

The United States, in Choosing Not to Repudiate The Determination of the WTO Decision in the Antigua and Barbuda Dispute, But to Work Within The Framework of the WTO to Amend the Treaty, Has Thereby Admitted the Validity and Enforcement Of the WTO Decision Declaring the United States to Be in Violation of International Law Permitting Internet Gambling.

The issue of the World Trade Organization (hereinafter referred to as the "WTO") decision in May 2007, that the United States was unlawfully restricting the right of Antigua and Barbuda companies to engage in Internet Gambling in the United States under the WTO agreements, was addressed more fully in iMEGA's initial brief in support of issuance of a Temporary Restraining Order. In addition, John K. Veroneau, Deputy U. S. Trade Representative, issued a statement on May 4, 2007 which explicitly invokes the WTO to clarify its commitments:

> The United States is invoking procedures under Article XXI of the General Agreement on Trade in Services (GATS) in order to clarify its commitment involving "recreational services," which was interpreted in the course of WTO dispute settlement as including a U.S. commitment to allow Internet gambling services.

Office of the United States Trade Representative, www.ustr.gov/Document_Library/Press Releases/2007, May 4, 2007.

iMEGA reiterates its prior arguments in Plaintiff's initial Brief which posit that the Antigua and Barbuda Appellate Panel decision is binding in this matter. Proper interpretation of a treaty presents a question of law which a court reviews *de novo*. *United States v. Morgan,* 216 *F.3d* 557, 561 (6th Cir. 2000), *cert. denied,* 532 U.S. 935, 121 S.Ct. 1389 (2001). Under the Supremacy Clause of the United States Constitution, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Constitution, Art. VI, cl. 2. Under Federal law treaties have the same legal effect as statutes. *See, e.g., Whitney v. Robertson,* 124 *U.S.* 190, 194, 8 *S.Ct.* 456 (1888); *United States v. Morgan, supra,* 216 *F.3d* at 562. As a general rule, however, international treaties do not create rights that are privately enforceable in the federal courts.

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamation, so far as the injured parties choose to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.

U.S. v. Emuegbunam, 268 F. 3d 377, 389-390 (6th Cir. 2001), *cert. den.* 535 *U.S.* 977, 122 *S.Ct.* 1450 (2002) (Citations omitted).

However, the United States Supreme Court has recognized that treaties can create individually enforceable rights in some circumstances. "Whether or not treaty violations can provide the basis for particular claims or defenses thus appears to depend upon the particular treaty and claim involved." *United States v. Lombera-Camorlinga,* 206 *F.3d* 882, 885 (9th Cir.), *cert. denied,* 531 *U.S.* 991, 121 *S.Ct.* 481 (2000). Absent express language in a treaty providing for particular judicial remedies, the federal courts will not vindicate private rights unless a treaty creates fundamental rights on a par with those protected by the Constitution. *U. S. v. Morgan, supra,* 216F.3d at 561-562.

Furthermore, the United States Supreme Court has routinely permitted parties to a litigation to enforce treaty provisions in domestic judicial proceedings. In *Sanchez-Llamas v. Oregon* ___ U.S. ___, ___, 126 *S.Ct.* 2669, 2696-2698, (2006), the Court considered, after a long line of cases including *Emuegbunam, supra,* whether the Vienna Convention's consular notification requirement created an exclusionary rule similar to *Miranda* rights in state court prosecutions. The majority assumed that the treaty created such rights without analysis because the United States Supreme Court does not exercise jurisdiction over state evidentiary rules. However, the dissent noted that the United States Supreme Court has routinely permitted parties to a litigation to enforce treaty provisions in domestic judicial proceedings. In *United States v. Rauscher*, 119 *U.S.* 407, 410-411, 7 *S.Ct.* 234 (1886), the Court ruled that a defendant could raise as a defense in his federal criminal trial the violation of an extradition treaty which provided for mutual agreement as to extradition. In *Kolovrat v. Oregon*, 366 *U.S.* 187, 191, n. 6, 81 *S.Ct.* 922 (1961), the Court held that held that foreign nationals could challenge a state law limiting their right to recover an inheritance based on a treaty providing that citizens of each of the countries with most favored nation status received equal treatment in property rights. In *Asakura v. Seattle*, 265 *U.S.* 332, 340, 44 *S.Ct.* 515 (1924), the Court allowed a foreign national to challenge a city ordinance forbidding non-citizens from working as pawnbrokers under a treaty that granted equal trade status to the citizens of each of the signatories, stating that while the courts construe treaties and statutes alike in determining meaning from the terms, the "rule of equality" prohibits implementing statutory law that renders any treaty term null and void. *Id.* at 341, 44 S.Ct. at 516 .

The *Sanchez-Llamas* dissent found that, historically, the United States Supreme Court has permitted a treaty to be enforced in litigation, even where the parties were not parties to the treaty, when three (3) common elements were present. First, the treaty which was sought to be enforced required the United States to treat foreign nationals in a certain manner. Second, the obligation imposed on the United States had been breached by the Government's conduct. Third, and finally, "the foreign national could . . . seek redress for that breach in a judicial proceeding, even though the treaty did not specifically mention judicial enforcement of its guarantees or even expressly state that its provisions were intended to confer rights on the foreign national." *Id.* at 2697-2698.

As Plaintiff has shown repeatedly, the rights and interests of its members and those whose activities are threatened by the UIGEA are constitutional in scope and of the highest order, arising under the First Amendment. Applying the three (3) factor test of *Sanchez-Llamas* to these fundamental rights, iMEGA is clearly entitled to enforce the final Appellate Panel decision of the WTO dispute in this case. The first element, that the treaty specifies a manner in which to treat foreign nationals, is clearly set forth in the WTO agreement and specifically in the Appellate Panel's Final Opinion, from which there was no appeal:

> 6.98 The chapeau of Article XIV of the GATS sets out the following requirement:
>
> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services".
>
> 6.99 The Panel recalls the Appellate Body's interpretation of this provision in this dispute:
>
> "The focus of the chapeau, by its express terms, is on the application of a measure already found by the Panel to be inconsistent with one of the obligations under the GATS but falling within one of the paragraphs of Article XIV. By requiring that the measure be applied in a manner that does not to [sic] constitute 'arbitrary' or 'unjustifiable' discrimination, or a 'disguised restriction on trade in services', the chapeau serves to ensure that Members' rights to avail themselves of exceptions are exercised reasonably, so as not to frustrate the rights accorded other Members by the substantive rules of the GATS."130 (footnotes omitted; emphasis provided).

07-209 U Part 1WT/DS285/RW *United States - Measures Affecting the Cross-border Supply of Gambling and Betting Services* - Recourse to Article 21.5 of the DSU by Antigua and Barbuda - Report of the Panel, dated March 30, 2007, paragraphs 6.98-6.99.

The second element, that the government against which the treaty is asserted has breached the treaty, is clearly established by the dispute decision and affirmance of the Appellate Panel. Further, the concession of the United States to seek to change its commitment to the WTO in the realm of Internet Gambling through clarification procedures, rather than disregard the decision, establishes the breach for the purposes cited here.

The third and final element is that the foreign national can seek redress for that breach in a judicial proceeding, even though the treaty does not specifically mention judicial enforcement of its guarantees or even expressly state that its provisions were intended to confer rights on the foreign national. At the present time the WTO's dispute resolution procedures, and the WTO treaty, only provide for economic sanctions. However, this is not the delimiting factor. The question is whether iMEGA, on behalf of its members who are, or do business, under foreign flags have access to the courts. Clearly they do. iMEGA possesses the requisite standing, Associational status, and asserts justiciable issues under the First Amendment to maintain this action.

The Defendants will likely argue that the Congressional adoption of the Uruguay Accords, implementing the GATS agreements and committing the United States to the precepts of the WTO, specifically negates the ability of a private party to seek a remedy in a court. 19 *U.S.C.* § 3512(c) provides that:

> No person other than the United States--
>
> (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or
>
> (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.

Such is not the case. Congress, in adopting statutory ratification of the GATS and joining the WTO, also enacted legislation to deal with precisely the conflict presented here. It has authorized the United States Trade Representative, an arm of the Executive branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation. Further, an administrative process requiring public notice and input is also included in the scheme. 19 *U.S.C.* §§ 3533(f-g); *Corus Staal BV v. Department of Commerce, et al.*, 395 *F.3d* 1343, 1349 (Fed. Cir. 2005), *cert. den.* 546 *U.S.* 1089, 126 *S.Ct.* 1023 (2006). In *Corus Staal BV,* already cited in Plaintiff's initial Brief, the Federal Circuit Court sustained a International Trade Court opinion denying preclusive effect to a WTO Appellate Panel decision that the United States had failed to implement mandated "zeroing" regulations related to antidumping laws because the United States Trade Representative, the designee under 19 *U.S.C.* §§ 3533(f-g), did not recommend compliance with the WTO Appellate Panel decision. In this case, however, in a dispute directly on point, and where the United States has been a party to the Appellate Panel decision process, the United States Trade Representative has stated that the United States will remain within the WTO process and seek to clarify the law at a later time. Where the U.S. is a party to a WTO Appellate Body determination, as it was in the Antigua and Barbuda dispute, that decision should be given binding effect. *Slater Steels Corp, et al., v. United States, et al.*, 297 *F. Supp. 2d* 1351, 1358 (Ct. Int. Trade), *aff'd o.b.* 159 *Fed. Appx.* 1007 (Fed. Cir. 2004).

Thus, the determination of the WTO that the United States government is in violation of the WTO because of its continued restrictions on Internet Gambling, equates to the same conclusions drawn here: that the UIGEA is unconstitutional. U.S. Constitution, Article VI, cl. 2. *See* Grunfeld, Michael, *Don't Bet on the United States Internet Gambling Laws: The Tension Between Internet Gambling Legislation and World Trade Organization Commitments,* 2007 Colum. Bus. L. Rev. 439, 446, 447 (2007). An illustrative case is *Public Citizen, et al., v. Department of Transportation, et al.*, 316 F.3d 1002 (9th Cir. 2003), arising under the North American Free Trade

Agreement (hereinafter referred to as "NAFTA"). Plaintiffs challenged the Federal Department of Transportation's failure to prepare an Environmental Impact Statement under mandatory regulations as part of the lifting of a moratorium on free access of Mexican trucks to American highways as required under NAFTA. The court noted that:

> [t]he treaty [NAFTA] as enacted into United States law specifically determined that in the case of a conflict between the treaty and federal law, federal law would prevail. . . . Congress also made clear that NAFTA cannot be construed "to amend or modify any law of the United States, including any law regarding ... the protection of human, animal, or plant life or health [or] the protection of the environment." *Id.* at 1012.

Plaintiffs alleged that the lifting of the moratorium without the required Environmental Impact Statement being prepared presented environmental and highway risks to citizens in specific border areas contiguous to Mexico. They alleged that the failure to assess these risks in the required statement created a significant risk of harm if the President's decision to lift the moratorium were implemented by the United States Department of Transportation through the issuance of permits. In determining whether Plaintiffs were entitled to have a restraining order issued the court first noted that the President's declarations on the subject in the political, social and economic sphere were sufficient to find that there was sufficient reason to believe that the permits would issue.

> Here, the President of the United States had committed himself to a course of action to which the United States was obligated under an important international treaty, passage of which was hard-fought and not without controversy, and as to which it was then in default. There were, of course, a number of developments that could have changed the President's mind on this issue-political, diplomatic, military, or economic-but that cannot detract from his announced intent to comply with the treaty (at least as far as this standing analysis is concerned). President Bush's public statement that he would lift the moratorium is sufficient for these purposes. *Id.* at 1018.

In the case at bar, the United States recently committed itself to clarifying its WTO commitments in regard to the Internet Gambling WTO decision. Plaintiff reiterates that John K. Veroneau, Deputy U. S. Trade Representative, issued a statement on May 4, 2007 which explicitly invokes the WTO to clarify its commitments:

> The United States is invoking procedures under Article XXI of the General Agreement on Trade in Services (GATS) in order to clarify its commitment involving "recreational services," which was interpreted in the course of WTO dispute settlement as including a U.S. commitment to allow Internet gambling services.

Office of the United States Trade Representative, www.ustr.gov/Document_Library/Press Releases/2007, May 4, 2007. As previously noted in iMEGA's initial Brief, the GATS treaty, under the Uruguay Accords, which ratified the United States' entry into the WTO, was adopted with specific language that it does not bind any court or the United States and has no effect where any provision or decision is inconsistent with United States law under 19 *U.S.C.* §2504(a) and 19 *U.S.C.* § 3512(a). But, as previously noted and as argued in Plaintiff's initial Brief , there is no clear inconsistency in the laws, and now, the United States has indicated it will remain within the WTO dispute resolution and attempt to clarify its obligation. Thus, the failure to adopt regulations under the UIGEA, in light of Veroneau's official pronouncement that the United States will continue with its WTO commitment, is tantamount to the presidential commitment in *Public Citizen, supra.*

As previously argued, while a U.S. court need not enforce an inconsistent decision of the WTO, *Corus Staal BV v. Department of Commerce, et al.*, 395 *F.3d* 1343 (Fed. Cir. 2005), it has long been a principle of international law that a court should interpret statutes consistently with U.S. international treaty obligations. *Id.* at 1347-1348, citing *Murray v. Schooner Charming Betsy,* 6 *U.S.* (2 Cranch) 64, 2 *L.Ed.* 208 (1804). Therefore, Plaintiff submits that the court should enter an order staying any further action in regard to the enforcement of the UIGEA because the United States' treaty obligation under the WTO decision, along with the failure to enact any regulations under the UIGEA gives rise to a right to enforce that decision for the benefit of iMEGA and its members. Further, the inconsistent regulation of Internet Gambling under the UIGEA, among the various states, and the constitutional impact of the UIGEA require that its enforcement or implementation by regulation be restrained.

CONCLUSIONS

For all the foregoing reasons, Plaintiff submits that Defendants' opposition to the motion before the court is unfounded. Plaintiff has standing individually and as an Association to assert the interference with fundamental constitutional rights which the UIGEA threatens to inflict. That threat is immediate and real because of the criminal and civil penalties which iMEGA's members face. The Plaintiff submits it has shown also that the UIGEA must be restrained and enjoined from enforcement now because the motion is ripe for adjudication due to the failure of the two (2) delegated agencies to enact regulations which would define the parameters of liability both civil and criminal.

First, Plaintiff has standing to challenge the UIGEA because of its immediate, documented affect on entities and persons situated as iMEGA's members. iMEGA has satisfied the criteria for issuance of a temporary restraining order: (1) there is a substantial likelihood that iMEGA will prevail on the merits; (2) clearly, iMEGA's members and those whose interests are represented will suffer irreparable injury unless the injunction issues; (3) the threatened injury to First Amendment protected rights outweighs the lack of damage if the UIGEA is not restrained; and, (4) the injunction, if issued, is not adverse to the public interest.

Next, the act of gambling in private on the Internet is protected by First Amendment privacy concerns. Further, filtering technology is recognized by The United States Supreme Court, led by the Third Circuit's integration of tradition and technology in the *COPA* litigation, as a less restrictive means to regulate protected conduct. State laws in at least the states of Missouri and New Jersey do not criminalize the act of betting with or for private winnings. Thus, the individual's right to access iMEGA's represented interests is a constitutionally protected activity which cannot be infringed by the UIGEA.

There is also precedent under the *In Re MasterCard* litigation holding that transmittal of Internet gambling funds through the use of internet payment system instruments is not an illegal act. Furthermore, the UIGEA itself is so inconsistent in striking across individual state regulation, sovereign Tribal licensing and sovereign international control of Internet gambling as to make the UIGEA violative of First Amendment rights. This inconsistency is nowhere more apparent than New Jersey, which permits the transfer of funds by payment system instrument by computer for the purpose of gambling, without reference to the location of the bet or wager. Not only New Jersey law, but the Wire Act itself, which has underpinned the few Internet Gambling prosecutions thus far, contain exemptions for individual players wagering only private money. At least one (1) case has found that the use of neutral payment system instruments merely to generate profit, as opposed to committing a violation of a uniformly enforced law, is not a ground for liability under *malum prohibitum* statutes. Additionally, the failure to enact regulations is a final administrative act which means that there is no standard by which to evaluate the legality illegality, or provide for the filtering protection, which UIGEA contemplates would be accomplished by the Defendants by delegation of the power to define a crime.

Finally, Plaintiff has demonstrated clearly and convincingly that damage has already occurred to its represented Internet Gambling enterprises by devaluation of stock and cessation of payment system instrument processing, as well as the direct impact on Plaintiff's affiliates and others. Standing alone, the threat of prosecution is sufficient to show the requisite irreparable harm if the court does not act to stop implementation of the UIGEA. It is this harm, and threat of harm, which clearly and directly threatens constitutional rights of iMEGA members and its affiliates.

Therefore, and as stated throughout its two (2) briefs, Plaintiff requests the court to restrain enforcement of the UIGEA because of the foregoing facts and the law. The UIGEA is unconstitutional and heralds a dangerous turn in the regulation of Internet based activities through the criminalization of use of payment system instruments to control private conduct.

Dated: September 10, 2007

Respectfully Submitted,
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United States District Court,
D. New Jersey.
Charles E. HUMPHREY, Jr., Plaintiff,
v.
VIACOM, INC., CBS Corporation, CBS Television Network, Sportsline.Com, Inc., The Walt Disney Company, ESPN, Inc., The Hearst Corporation, Vulcan, Inc., Vulcan Sports Media and The Sporting News, Defendants.
No. 06-2768 (DMC).
June 20, 2007.

James Stuart Notis, Gardy & Notis, Englewood Cliffs, NJ, for Plaintiff.
Kenneth Friedman, Manatt, Phelps, & Phillips, LLP, Peter C. Harvey, Patterson Belknap Webb & Tyler, New York, NY, for Defendants.

OPINION

DENNIS M. CAVANAUGH, U.S. District Judge.
***1** This matter comes before the Court upon motions by Defendants ESPN, Vulcan Sports Media and Sportsline.com ("Defendants") to dismiss Complaint of Charles E. Humphrey, Jr. ("Plaintiff" or "Humphrey") pursuant to Federal Rule of Civil Procedure. 12(b)(6). No oral argument was heard pursuant to Federal Rule of Civil Procedure 78. After carefully considering the submissions of the parties and for the following reasons, Defendants' motions to dismiss Plaintiff's Complaint are **granted.**

BACKGROUND

Fantasy Sports

Fantasy sports leagues allow participants to "manage" virtual teams of professional players in a given sport throughout a sport's season and to compete against other fantasy sports participants based upon the actual performance of those players in key statistical categories. Fantasy sports have become extremely popular in recent years. They have earned a place in modern popular culture and are the subject of countless newspaper and magazine articles, books, internet message boards and water-cooler conversations. The enormous popularity of fantasy sports can be attributed in part to the services offered on internet websites, such as those operated by Defendants. The websites provide a platform for real-time statistical updates and tracking, message boards and expert analysis. (Compl.¶¶ 26-31).

Fantasy sports leagues allow fans to use their knowledge of players, statistics and strategy to manage their own virtual team based upon the actual performance of professional athletes through a full season of competition. In the early days of fantasy sports, participants compiled and updated the players' statistics manually. Today, the rapid growth of the internet fostered additional services, such as those offered by Defendants, that provide an internet environment and community for playing and discussing fantasy sports. The technology also allows for automatic statistic updates for players and teams and access to expert fantasy sports analysis. As a result, fantasy sports have become much more accessible and popular throughout the country. *Id.*

Although the rules and services vary somewhat from one fantasy sports provider to another, the websites operate as follows. Participants pay a fee to purchase a fantasy sports team and the related services. The purchase price provides the participant with access to the support services necessary to manage the fantasy team, including access to "real-time" statistical information, expert opinions, analysis and message boards for communicating with other participants. *Id.*

The purchase price also covers the data-management services necessary to run a fantasy sports team. Using these services, the participants "draft" a slate of players and track the performance of those players in key statistical categories throughout the season. Participants are grouped into "leagues" of as many as twelve teams and compete not only against the members of their own leagues, but can also compete against the winners of the other leagues. *Id .* at ¶¶ 45-46.

***2** The success of a fantasy sports team depends on the participants' skill in selecting players for his or her team, trading players over the course of the season, adding and dropping players during the course of the season and deciding who among his or her players will start and which players will be placed on the bench. The team with the best performance-based upon the statistics of the players chosen by the participant-is declared the winner at the season's end. Nominal prizes, such as T-shirts or bobble-head dolls, are awarded to each participant whose team wins its league. Managers of the best teams in each sport across all leagues are awarded larger prizes, such as flat-screen TVs or gift certificates. These prizes are announced before the fantasy sports season begins and do not depend upon the number of participants or the amount of registration fees received by Defendants. *Id.* at ¶¶ 32-48.

Plaintiff's Complaint

Plaintiff filed a Complaint on or around June 20, 2006, against Viacom Inc., the CBS Corporation, the CBS Television Network, Sportsline.com, Inc, The Hearst Corporation, The Walt Disney Company, ESPN, Inc., Vulcan, Inc., Vulcan Sports Media and The Sporting News for alleged violations of the anti-gambling laws of New Jersey and several other states. Only ESPN, Sportsline and Vulcan Sports Media remain in the case as Defendants. Plaintiff voluntarily dismissed all other Defendants. The Defendants operate separate pay-for-play online fantasy sport leagues.

The Complaint alleges that Defendants operate three distinct pay-for-play fantasy sports sites in violation of several states' *qui tam* gambling loss-recovery laws. The Complaint indicates that Plaintiff is invoking the *qui tam* laws of the District of Columbia, Georgia, Illinois, Kentucky, Massachusetts, New Jersey, Ohio and South Carolina in an attempt to recover losses incurred by the residents of each state who participated in the Defendants' fantasy sports games.

Although each state's *qui tam* statutes differ slightly, there are no substantial differences between the New Jersey statute and those of the other states. Through invocation of the various *qui tam* laws, Plaintiff alleges that he is entitled to recover the individual gambling losses of all participants of the Defendants' allegedly unlawful gambling schemes. Plaintiff claims that the registration fees paid by fantasy sports leagues participants constitute wagers or bets, and he seeks to recover these fees pursuant to the *qui tam* gambling loss-recovery statutes. In other words, Humphrey concludes that the Defendants' fantasy sports leagues constitute gambling because the participant "wagers" the entry fee for the chance to win a prize and the winner is determined predominantly by chance due to potential injuries to players and the vicissitudes of sporting events in general.

The ESPN Defendants filed a 12(b)(6) Motion to Dismiss on September 28, 2006. The Sportsline and Vulcan Sports Media Defendants together filed their own 12(b)(6) Motion to Dismiss on September 29, 2006.

Qui Tam Statutes

***3** The *Qui Tam* statutes derive from the 1710 Statute of Queen Anne, an English statute that authorized gambling losers and informers to sue to recover losses incurred "at any [t]ime or sitting by playing at [c]ards, [d]ice, [t]ables or other [g]ame or [g]ames whatsoever or by betting on the [s]ides or [h]ands of such as do play at any of the [g]ames aforesaid." 9 Anne ch. 19 (1710), *reproduced* in 9 Statutes of the Realm (George Eyre & Andrew Strahan, pubs., 1810-1822).

The American versions of the Statute of Anne contain similar language and were similarly directed at deterring traditional gambling. New Jersey's statute, for example, was adopted in 1797 and permitted the recovery of losses incurred "by playing at cards, dice, billiards, tables, tennis, bowls, shuffle-board, or other game or games, or by betting on the sides or hands of such as do play at any game or games, or by betting at cock-fighting, or other sport or pastime." Act to Prevent Gaming, February 8, 17907, ¶¶ 4-5, *at* New Jersey Session Laws, Legislature 21, 149-151.

Although the specific elements of the *Qui Tam* statutes vary, they share a common origin and purpose. They were intended to prevent gamblers and their families from becoming destitute due to gambling losses-and thus becoming wards of the State-by providing a method for the gambler's spouse, parent or child to recover the lost money from the winner. *See Berkebile v. Outen,* 311 S.C. 30, 55 (1993) (*qui tam* statute's purpose is to "protect a gambler ... from abusing the vice and exceeding limits which bring harm to the gambler and his or her family"); *Salonen v. Farley,* 82 F.Supp. 25, 28 (E.D.Ky.1949) (*qui tam* statute was "primarily intended by the legislature ... for the protection of the dependents of those losing in gambling"). The statutes were also intended to supplement states' general anti-gaming provisions in an era when local governments' own regulatory and enforcement powers were much less effective than they are today. *See e.g., Vinson v. Casino Queen, Inc.,* 123 F.3d 655, 657 (7th Cir.1997) (The [Illinois] Loss Recovery Act was intended to deter illegal gambling by using its recovery provisions as a powerful enforcement mechanism."); *Salomon v. Taft Broadcasting Co.,* 16 Ohio App.3d 336, 475 N.E.2d (1292, 1293 (Ct.App. Pt Dist., 1984) (observing that *qui tam* statute was "born in a vanished era where the absence of an organized police authority to enforce criminal statutes made necessary the use of such rewards for informers").

ANALYSIS

Legal Standard on a Motion to Dismiss

In deciding a Rule 12(b)(6) motion to dismiss, the Court is required to accept as true the allegations in the complaint, and to view them in the light most favorable to the plaintiff, but the Court "need not credit a complaint's 'bald assertions' or 'legal conclusions.' " *Morris v. Lower Merion School Dist.,* 132 F.3d 902, 906 (3d Cir.1997). Rather, the Third Circuit has explained that:

***4** the plaintiff must allege sufficient facts in the complaint to survive a Rule 12(b)(6) motion. Confronted with such a motion, the court must review the allegations of fact contained in the complaint; for this purpose, the court does not consider conclusory recitations of law.

Commonwealth of Pa. v. PepsiCo, Inc., 836 F.2d 173, 179 (3d Cir.1988).

A plaintiff who fails to allege basic facts in support of his claims should not be allowed to proceed. *See* DM Research v. Coll. of Am. Pathologists, 170 F.3d 53, 55-56 (1st Cir.1999) ("[T]he price of entry, even to discovery, is for the plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition.).

Stating a Claim under *Qui Tam* Laws

Plaintiff asserts claims under the gambling *qui tam* statutes of the District of Columbia, Georgia, Illinois, Kentucky, Massachusetts, New Jersey, Ohio and South Carolina. Courts have long held that the *qui tam* statutes must be narrowly construed because they are penal in nature. *E.g.,* Justice v. The Pantry, 335 S.C. 572 (1999) (South Carolina statute is penal and must be strictly construed); State v. Schwabie, 84 N.E.2d 768, 770-71 (Ohio App.1948) (Ohio statute is penal and must be strictly construed); *see also, e.g.,* Kizer v. Walden, 198 Ill. 274, 65 N.E. 116 (Ill.1902) (Illinois statute is penal); Donovan v. Eastern Racing Ass'n, 324 Mass. 393, 86 N.E.2d 903 (Supreme Judicial Court, 1949) (Massachusetts statute is penal); Glick v. MTV Networks, 796 F.Supp. 743, 745 (S.D.N.Y.1992) (New Jersey statute is "quasi-penal"); Hartlieb v. Carr, 94 F.Supp. 279, 281 (E.D.Ky.1950) (Kentucky statute provides a penalty).

Courts have also construed the *qui tam* statutes narrowly in light of their history and purpose, in part because they provided a remedy in derogation of the common law. *E.g.,* Vinson, 123 F.3d at 657 (*qui tam* statute "should not be interpreted to yield a ... result contrary to its purpose"); Cole v. Applebury, 136 Mass. 525, 530-31, 1884 WL 10512, at *5 (Mass.1884) (*qui tam* statute "must be enforced ... according to its ... intent"); Thompson v. Ledbetter, 74 Ga.App. 427, 428, 39 S.E.2d 720, 721 (Ct.App.Div.2, 1946) (construing statute narrowly because gambling losses were not recoverable under the common law); Johnson v. McGregor, 41 N.E. 558 (Ill.Sup.Ct.1895) (Statutory conditions for recovery must be strictly observed because the right of action exists "by virtue of the statute only"); Hooker v. Depalos, 28 Ohio St. 251, 262, 1876 WL 6, at *7 (Ohio 1876) (because loss-recovery statutes "are in derogation of the common law ... [they] are to be construed strictly").

These principles of strict and narrow construction are particularly appropriate in this case, where Plaintiff seeks to recover unspecified losses to which he has no personal connection. While *qui tam* plaintiffs often have not personally suffered a loss, they are not excused from the obligation to allege specific facts demonstrating that their claims are within the narrow confines of the statutes under which they seek relief. In considering a similar claim brought by a plaintiff seeking damages under a gambling loss-recovery statute, the court in Salomon v. Taft Broadcasting Co., 16 Ohio App.3d 336, 475 N.E.2d 1292, 1298 (Ct.App. 1st Dist., 1984), explained that given the anachronistic purpose of the *qui tam* statutes, it would be inappropriate to enforce them in any way that would extend their reach beyond the scope originally intended:

***5** [I]t is significant that no authority is cited to us from anywhere in this jurisdiction or elsewhere which would permit a third person, wholly a stranger to the transaction, to recover for his own use, [an] unknown (but presumably substantial) amount of money lost by unnamed and unknowable persons in unspecified games of chance....

Similarly, it is not possible to ignore the ancient and arguably anachronistic nature of *qui tam* actions of the instant sort, born in a vanished era where the absence of an organized police authority to enforce criminal statutes made necessary the use of such rewards for informers ... While it is not within the authority of the judiciary to abolish legislative enactments, however obsolete they may arguably appear to be, we certainly are authorized to decline any construction which would extend and enlarge the thrust and scope of the legislation in question.

The *Salomon* court's reasoning is squarely applicable to this case. This Court will not extend the *qui tam* statutes to cover fantasy sports league entry fees unless that coverage is warranted by the explicit language of each statute and is supported by specific allegations of Plaintiff.

A review of Plaintiff's Complaint indicates that his allegations are tailored exclusively to New Jersey's gambling loss-recovery statute. As the Complaint asserts, New Jersey law allows a loser-or a *qui tam* plaintiff-to recover from a "winner, depositary or stakeholder" money lost by a "wager[ ], bet[ ], or stake[ ]. *N.J.S.A.* 2A:40-6). Plaintiff does not address the elements of a cause of action under any state's law other than New Jersey's.

Does Plaintiff Allege the Specific Facts Necessary to Pursue a Qui Tam Claim?

Plaintiff must come forth with facts to support his claim that there exists a specific loss that he is entitled to recover under New Jersey's *qui tam* statute. In 1898, the New Jersey Supreme Court held that a plaintiff proceeding under the gambling loss-recovery *qui tam* statute is legally bound" to show with "clearness and certainty" that his case is "within the statute." *Fitzgerald v. Schlos,* Vroom 472, 474, 41 A. 677 (N.J.1898). In that case, the *qui tam* plaintiff identified a specific individual who lost money to the defendant on a specific race. *Id* . Nonetheless, the Court upheld a dismissal of the complaint because-although the plaintiff had alleged that the individual had "lost" money on a race to the defendant-the plaintiff had not specifically alleged that the money was a bet or wager on the race and that the defendant was the winner. *Id.*

Here, the Complaint is far less detailed than the pleading dismissed in *Fitzgerald.* Plaintiff does not identify any individual who paid an entry fee to play one of the Defendants' fantasy sports games; he does not identify the nature of the "wager" or "bet" made between such an individual and either of the Defendants; he does not allege when the loss occurred; and, as in *Fitzgerald,* he does not allege that such an individual lost such a "wager" or "bet" to either of the Defendants.

***6** Plaintiff fails to identify even one individual who participated in even one of the subject leagues, much less one who allegedly lost money to Defendants in those leagues, and concedes that he has done neither himself. (Compl.¶¶ 9, 71). In short, Plaintiff asks this Court to indulge a gambling *qui tam* suit seeking a "recover[y] for his own use, unknown amount of money lost by unnamed and unknowable persons." Salamon, 475 N.E.2d at 1298.

New Jersey's adoption of more modern notice pleading rules has not changed the strict requirement that a plaintiff seeking to pursue a claim under the gambling loss-recovery statute "must, in his pleading, allege all the facts necessary to bring him within the statute." *Zabady v. Frame,* 22 N.J.Super. 68, 70 (App.Div.1952). As the *Zabady* court noted in requiring that every "essential element" of the gambling loss recovery statute must be pleaded:

the substantive law has not been changed by the adoption of our new rules but, on the contrary, it has been preserved, and our procedure has been made to serve the ends of substantial justice, not by abandoning stating the essentials of a cause of action or defense, but by doing so in simple, concise and direct terms.

Id, 22 N.J.Super. at 71.

Here, the Complaint lacks the most basic factual allegations necessary to support Plaintiff's claim. Plaintiff has neither alleged all of the elements of a claim under New Jersey's *qui tam* statute nor alleged a "factual predicate concrete enough to warrant further proceedings," DM Research, 170 F.3d at 55-56, much less the type of factual predicate required by courts strictly and narrowly construing the *qui tam* statutes. Plaintiff fails to allege the purported amount of alleged "losses," or when those alleged losses were purportedly sustained.

In addition to failing to plead the identity of the loser(s), the amount of each loser's loss, when the loss occurred, the nature of the "wager" or "bet" made between a "loser" and either of the Defendants, Plaintiff does not allege, as he must under the statute, that (1) a "loser" failed to bring suit within six months of losing the bet; and (2) his own suit is brought within six months of the expiration of that "loser's" time to sue. New Jersey courts have held that the six-month time limitation provided for in New Jersey's gambling loss-recovery statute is an affirmative element of the claim that must be pleaded. Zabady, 22 N.J.Super. at 70 (requirement that loser sue within six months "is a condition attached to the right to sue," rather than a limitation on recovery, and "[a] complaint does not state a cause of action if it fails to contain an allegation showing compliance with this essential element"); Shack v. Dickenshorst, 14 Gummere 120, 122, 122 A. 436, 436 (N.J. Court of Errors and Appeals, 1923). Failure to plead compliance with these time limits mandates dismissal of the Complaint. *See* Zabady, 22 N.J.Super. at 70 (dismissing complaint for failure to plead compliance with time limits); Shack, 14 Gummere at 122.

***7** Given the absence of the necessary factual allegations showing a recoverable loss under New Jersey's *qui tam* statute, this Court grants Defendants' motions to dismiss and finds no substantial difference between New Jersey's *qui tam* statute and those of the other jurisdictions under which Plaintiff brought his Complaint.

Is Payment of an Entry Fee to Participate in Fantasy Sports Leagues Gambling?

Defendants argue that Plaintiff fails to state a claim under New Jersey's *qui tam* statute because, as a matter of law, the payment of an entry fee to participate in a fantasy sports league is not wagering, betting or staking money. New Jersey allows recovery only of "wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event." *See* N.J.S.A. 2A:40-1. Although Plaintiff uses the words "wager" and "bet" to describe the entry fees for ESPN's fantasy sports games (*e.g.* Cmplt. ¶¶ 4, 19), those allegations are legal conclusions, and "a court need not credit a complaint's ... legal conclusions when deciding a motion to dismiss." *See* Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir.1997).

As Plaintiff alleges, Defendants' fantasy sports league participants pay a set fee for each team they enter in a fantasy sports league. This entry fee is paid at the beginning of a fantasy sports season and allows the participant to receive related support services and to compete against other teams in a league throughout the season. As Plaintiff further alleges, Defendants offer set prizes for each league winner and for the overall winners each season. These prizes are guaranteed to be awarded at the end of the season, and the amount of the prize does not depend on the number of entrants. Moreover, Defendants are neutral parties in the fantasy sports games-they do not compete for the prizes and are indifferent as to who wins the prizes. Defendants simply administer and provide internet-based information and related support services for the games. Plaintiff does not allege otherwise.

New Jersey courts have not addressed the three-factor scenario of (1) an entry fee paid unconditionally, (2) prizes guaranteed to be awarded and (3) prizes for which the game operator is not competing. Courts throughout the country, however, have long recognized that it would be "patently absurd" to hold that "the combination of an entry fee and a prize equals gambling," because if that were the case, countless contests engaged in every day would be unlawful gambling, including "golf tournaments, bridge tournaments, local and state rodeos or fair contests, ... literary or essay competitions, ... livestock, poultry and produce exhibitions, track meets, spelling bees, beauty contests and the like," and contest participants and sponsors could all be subject to criminal liability. State v. Am. Holiday Ass'n, Inc., 151 Ariz. 312, 727 P.2d 807, 809, 812 (Ariz.1986) (*en banc*).

***8** Courts have distinguished between *bona fide* entry fees and bets or wagers, holding that entry fees do not constitute bets or wagers where they are paid unconditionally for the privilege of participating in a contest, and the prize is for an amount certain that is guaranteed to be won by one of the contestants (but not the entity offering the prize). Courts that have examined this issue have reasoned that when the entry fees and prizes are unconditional and guaranteed, the element of risk necessary to constitute betting or wagering is missing:

A prize or premium differs from a wager in that in the former, the person offering the same has no chance of his gaining back the thing offered, but, if he abides by his offer, he must lose; whereas in the latter, each party interested therein has a chance of gain and takes a risk of loss ...

The fact that each contestant is required to pay an entrance fee where the entrance fee does not specifically make up the purse or premium contested for does not convert the contest into a wager.

Las Vegas Hacienda, Inc. v. Gibson, 77 Nev. 25, 359 P.2d 85, 86-87 (Nev.1961). *See also* Am. Holiday Ass'n, 727 P.2d at 810 ("[A] bet is a situation in which the money or prize belongs to the persons posting it, each of whom has a chance to win it. Prize money, on the other hand, is found where the money or other prize belongs to the person offering it, who has no chance to win it and who is unconditionally obligated to pay it to the successful contestant."). Therefore, where the entry fees are unconditional and the prizes are guaranteed, "reasonable entrance fees charged by the sponsor of a contest to participants competing for prizes are not bets or wagers." Am. Holiday Ass'n, 727 P.2d at 811.

Plaintiff incorrectly argues that the case law cited by Defendants is inapplicable because it applies only to games of skill. To the contrary, none of the decisions cited by Defendants turn on whether the activity in question is a game of skill or chance. Indeed, courts have made clear that the question whether the money awarded is a *bona fide* prize (as opposed to a bet or wager) can be determined without deciding whether the outcome of the game is determined by skill or chance. *See* Las Vegas Hacienda, 359 P.2d at 87. ("Whereas we have concluded that the contract does not involve a gaming transaction [because there is no bet or wager], consideration of ... [whether] the shooting of a "hole-in-one" was a feat of skill ... becomes unnecessary.").

Plaintiff's argument that the distinction between "bets" and "entry fees" is meaningless in the context of a lottery is similarly unavailing. In his brief in opposition to Defendants' motions to dismiss, Plaintiff states that "Defendants operate[ ] an enterprise that has all of the necessary elements of gambling: 'prize, chance and consideration.' " In the very next line, Plaintiff states that those three elements are essential of a lottery, however a separate statutory scheme governs lotteries.

***9** That betting/wagering is a subset of gambling activity, different from lotteries, is made clear by the fact that a separate statute- N.J.S.A. 2A:40-8-provides for a *qui tam* action to penalize the operators of lotteries. This distinction between gaming and lotteries has been a part of New Jersey's statutory scheme since the first gambling loss recovery statutes were passed in 1797. *See* Act to Prevent Gaming, February 8, 1797, ¶¶ 4-5, *at* New Jersey Session Laws, Legislature 21, 149-151 (providing for *qui tam* action to recover money lost "by playing at cards ... or other games, or by betting ... at cock-fighting, or other sport or pastime"); An Act for Suppressing of Lotteries, February 13, 1797, ¶ 2, *at* New Jersey Session Laws, Legislature 21, 166-167 (providing for *qui tam* action to recover a penalty from any person who operates a lottery).

Plaintiff seeks relief under the betting and wagering statute, *N.J.S.A.* 2A:40-6, not the lottery statute, *N.J.S.A.* 2A:40-8. Accordingly, the lottery case law Plaintiff cites is irrelevant. For example, Plaintiff's primary argument in opposition to this motion to dismiss is that he has alleged that Defendants' fantasy sports leagues involve "gambling" as described in *Lucky Calendar Co. v. Cohen*, 117 A.2d 487, 488 (N.J.1955), a case that dealt solely with New Jersey's now-repealed Lottery Act, *N.J.S.A.* 2A:121-6. The issue in that case was whether a certain promotional advertising scheme constituted a "lottery" for purposes of the Lottery Act. *Lucky Calendar Co.*, 117 A.2d at 493-94. The mantra Plaintiff repeats in his Complaint and opposition brief-"prize, chance and consideration"-is the *Lucky Calendar* court's definition of a lottery. *Id.* This case does not concern a lottery. Consequently, *Lucky Calendar* is simply irrelevant. Because the "prize, chance, consideration" test is irrelevant here, Plaintiff's argument that fantasy sports leagues are games of chance is without effect. Although Defendants deny that fantasy sports leagues are games of chance, this Court need not reach this issue in deciding Defendants' motions.

As a matter of law, the entry fees for Defendants' fantasy sports leagues are not "bets" or "wagers" because (1) the entry fees are paid unconditionally; (2) the prizes offered to fantasy sports contestants are for amounts certain and are guaranteed to be awarded; and (3) Defendants do not compete for the prizes.

Are Defendants "Winners" under the Qui Tam Statutes?

Defendants cannot be considered "winners" as a matter of law. In his opposition brief, Plaintiff asserts that Defendants are winners because they "receive and keep, and thus win, the pay-to-play net consideration that must be paid by the players in order to be allowed to enter theses (sic) fantasy sports games of chance." Plaintiff, however, provides no legal support whatsoever for this assertion.

This Court need not accept as true Plaintiff's unsupportable assertion that Defendants are "winners" under the *qui tam* statutes. *See* Doug Greate, Inc. v. Greay Bay Casino Corp., 232 F.3d 173, 1843 (3d Cir.2000). Defendants plainly are not "winners" as a matter of law, but merely parties to an enforceable contract. Defendants provide substantial consideration, in the form of administration of the leagues and the provision of extensive statistical and analytical services, in exchange for the entry fees paid for participation in the fantasy leagues. At no time do Defendants participate in any bet. Absent such participation, Defendants cannot be "winners" as a matter of law. Las Vegas Hacienda, 359 P.2d at 86 (offering prize to winner of athletic or similar competition does not give rise to a wagering contract if the offeror does not participate in the competition and has no chance of gaining back the prize offered). To suggest that one can be a winner without risking the possibility of being a loser defies logic and finds no support in the law.

***10** Furthermore, Defendants are not "winners" under the plain terms of the *qui tam* statutes. The statutes make clear that the "winner" must be a participant in the card, dice or other game at issue. For example, the D.C., Massachusetts, and South Carolina statutes define a "winner" as one who wins by playing at cards, dice or any other game, or by betting on the sides or hands of person[s] who play." D.C.Code § 16-1702; Mass. Gen. Laws ch. 137, § 1; S.C.Code § 32-1-10. In Kentucky, only the "winner" of money from a gambling loser is liable under the statute. *Tyler v. Goodman*, 240 S.W.2d 582, 584 (Ky.Ct.App.1951). The New Jersey statute likewise makes clear that a "winner" is one who actually "wagers, bets or stakes" upon a race, game or other unknown or contingent event. *N.J.Rev.Stat.* §§ 2A:40-1, 2A:40-6.

Finally, Plaintiff's allegations in the Complaint confirm that Defendants do not compete against fantasy sports participants in any way, and do not "win" anything from them. Defendants provide extensive services to the participants throughout the course of the relevant sports season. (Compl. ¶¶ 45-48, Friedman Decl. Ex. R at ¶ 2). At the end of the season, Defendants award prizes, in pre-determined amounts fixed by contract, to the team managers who have accrued the most "fantasy points" or victories. At no point do the participant-owners of any team pay anything to Defendants that is in any way dependent on the outcome of any league. Nor do participants ever "risk" losing their entry fee-they irrevocably part with that fee shortly after they enter a league, and receive in exchange substantial services from Defendants over the course of an extended sports season.

Accordingly, because Defendants do not "play" in the fantasy leagues, bet on the side of any of the participants or have any financial interest whatsoever in the outcome of any league, Defendants cannot be "winners" subject to liability under the gambling *qui tam* statutes as a matter of law.

Do Fantasy League Participants Sustain the "Loss" Necessary to Bring a Claim?

A *qui tam* plaintiff like Humphrey has no right to recovery unless a participant in gambling activity wins money from one who loses money in that activity. In addition to the fact that fantasy leagues are not gambling and that defendants do not win anything, participants suffer no "loss" in participating in the fantasy leagues. *See* D.C.Code § 16-1702; Ga.Code Ann. § 13-8-3; 720 Ill. Comp. Stat. 5/28-8; Ky.Rev.Stat. Ann. § 372.020; Mass. Gen. Laws ch. 137, § 1; Ohio Rev.Code Ann. § 3763.02; N.J.Rev.Stat. § 2A:40-5; S.C.Code Ann. § 32-1-20.

No fantasy league participant suffered any such "loss." To the contrary, participants pay Defendants a one-time, non-refundable entry fee to participate in the leagues, and receive in consideration for that fee the benefit of Defendants' extensive administrative, statistical and analytical services throughout the relevant sports season. Only at the end of the sports season are prizes awarded, in amounts fixed by the contracts that govern participation in the leagues. Accordingly, in paying for the right to participate in the leagues and receive Defendants' services, participants simply do not "lose" anything, and certainly suffer no cognizable "gambling" loss. Whether or not a participant is a successful league manager, their entry fee never hangs in the balance in any way in connection with their participation in the league. (Compl. ¶¶ 15, 22; Friedman Decl. Ex. O at 3; http:// sprtingnews.com/contract/canellation.html (Sept. 28, 2006)). Indeed, once participants have selected their team and begin their season, the fee cannot be recovered. There is no "loss" on these facts, and this exchange of consideration is an "ordinary contract," in which "both parties may ultimately gain by entering into the agreement." *Martin v. Citizens' Bank of Marshallville*, 171 S.E. 711, 713 (Ga.1933).

***11** Because those who participate in Defendants' fantasy sports leagues do not suffer the required "loss" under any of the *qui tam* statutes pursuant to which Plaintiff brings his

Complaint, Plaintiff cannot recover as a matter of law.

Federal Law Confirms that the Complaint Should be Dismissed.

The Unlawful Internet Gambling Enforcement Act of 2006 broadly prohibits Internet gambling and related transactions. *See* 31 U.S.C. § 5361 *et seq.* That law confirms that fantasy sports leagues such as those operated by Defendants do not constitute gambling as a matter of law. *See* 31 U.S.C. § 5362(1)(E)(ix). Under the law, an illegal "bet" or "wager" specifically does not include "participation in any fantasy or simulation sports game where, as here:

(I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.

(II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominately by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.

No winning outcome is based-

(aa) on the score, point-spread, or any performance or performances of any single real-world team or a combination of such teams; or

(bb) solely on any single performance of an individual athlete in any single real-word sporting or other event.

Id. Federal law thus confirms that Plaintiff's case must be dismissed. This Court will not deviate from this analysis, nor should it extend the coverage of a 200-year old statute to an activity far removed from the traditional gaming it was never intended to cover. *See* *Salomon,* 16 Ohio App.3d at 336, 475 N.E .2d at 1293 (court should "decline any construction which would extend and enlarge the thrust and scope" of the *qui tam* statute).

CONCLUSION

For the reasons stated, it is the finding of this Court that defendants' motions to dismiss Plaintiff's Complaint are **granted.** An appropriate Order accompanies this Opinion.

D.N.J.,2007.
Humphrey v. Viacom, Inc.
Slip Copy, 2007 WL 1797648 (D.N.J.)